Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1743

DOWNTOWN L.A. IMPORTS, DOWNTOWN L.A. MOTORS, VOLKSWAGEN OF DOWNTOWN L.A., PORSCHE/AUDI OF DOWNTOWN L.A., GIANT FELIX CHEVROLET,

Appellants,

vs.

EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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EVELLE J. YOUNGER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Appellee.

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Superior Court of the State of California for the County of Los Angeles, on the grounds that appellant has not presented a substantial federal question and on the grounds that the question raised by the appellant is so unsubstantial as not to need further argument.

Question Presented

Whether California Government Code sections 11180, 11187 and 11188 which allow the Attorney General to investigate the business activities of the appellant corporations and which require said corporations to produce corporate records pursuant to that investigation are in violation of the United States Constitution?

Statement of the Case

Following a hearing on an order to show cause, the Superior Court of the State of California for the County of Los Angeles, on December 12, 1977, ordered Nicholas Shammus or another appropriate officer of appellant corporation to produce documents subpoenaed by the Attorney General. Appellants filed a Petition for Writ of Prohibition and/or Writ of Mandate in the Court of Appeal of the State of California, Second Appellate District, seeking to halt enforcement of the order of Superior Court. The petition was denied without opinion. Appellants sought a hearing in the California Supreme Court. The hearing was denied without opinion. Appellants then filed an appeal to this court.

ARGUMENT

State Statutes Allowing the Attorney General to Inspect Corporate Records Pursuant to an Investigation Without First Making a "Good Cause" Showing That the Company Whose Records Are Being Examined Is in Violation of California Law Are Not Constitutionally Invalid

The appellants contend that the United States Constitution does not allow the Attorney General to compel production of books and records pertaining to advertisements of the company (Plaintiff's Appeal p. 8). Plaintiffs erroneously contend that this issue has not been decided by the federal courts (Plaintiff's Appeal p. 8). In fact, the appellants' position has been rejected by this court and by various federal and state courts for many years. In *United States v. Morton Salt Co.* 338 U.S. 632, 642, 643 (1949), this court stated,

"The only power that is involved here is the power to get information from those who best can give it and who are most interested in doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

> When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law."

This court has never varied from that view. *See United States v. Powell* (1964) 379 U.S. 48, 57. The same views are found in the California appellate courts. *See Brovelli v. Superior Court* (1961) 56 Cal.2d 524, 529; *People v. West Coast Shows, Inc.* (1970) 10 Cal.App.3d 462, 468; *Fielder v. Berkeley Properties Co.* (1972) 23 Cal.App.3d 30, 38. Similar expressions concerning authority to investigate are bound in federal appellate decisions. *See F.T.C. v. Texaco, Inc.* (1977) 555 F.2d 862, 872; *Link v. N.L.R.B.* (1964) 330 F.2d 437; *DeMasters v. Arend* (1963) 313 F.2d 79, 88-90; *F.T.C. v. Standard American, Inc.* (1962) 306 F.2d 231, 234; *Application of Barnes* (1955) 219 F.2d 137, 143. The appellant cites no cases that question this court's ruling in *United States v. Morton Salt Co.* or the other cases cited above.

Although it is difficult to determine the exact nature of the argument made by the appellants, they seem to be saying that their advertising constitutes speech, that the speech is protected by the First Amendment and that therefore the Attorney General has no authority over an investigation of such advertising. As this court stated in *Va. Pharmacy Bd. v. Va. Consumer Council* (1975) 425 U.S. 748, 771-772,

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974); Konigsberg v. State Bar, 366 U.S. 36, 49 and n. 10, 6

> L.Ed.2d 105, 81 S.Ct. 997 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We forsee no obstacle to a State's dealing effectively with this problem. [footnote omitted] The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."

Although this court has sought to restrict bans on advertising, it certainly has not insulated all commercial speech from examination. In *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383, this court held:

> "Advertising that is false, deceptive, or misleading of course is subject to restraint. *See Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. at 771-772, and n.24. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness discourage protected speech. Id., at 771-772, n.24. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. [citations]."

Appellants do not challenge the Attorney General's authority to bring appropriate action for false advertising or for unfair business practices. This court in

Va. Pharmacy Bd. v. Va. Consumer Council, supra, and *Bates v. State Bar of Arizona, supra,* recognizes the State's responsibility and authority to prevent such false advertising. Investigations, including subpoena of documents, to determine the existence of false advertising or unfair business practices are clearly recognized as an acceptable method of discovery. Appellants have pointed to no irregularity or impropriety in the form of the subpoena and have failed to attempt to distinguish or even to mention *United States v. Morton Salt Co., supra,* although they were made aware of that case in the proceedings below.

Conclusion

Appellants in their unnumbered appeal set forth no substantial federal question and the arguments that are made by appellants are so unsubstantial as not to need further argument.

For the reasons set forth above, it is respectfully requested that the motion to dismiss or affirm be granted.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

MICHAEL BOTWIN,
Deputy Attorney General,

By MICHAEL BOTWIN,
Deputy Attorney General,

Attorneys for Appellee.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1978.

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